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N B. Smith

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# THE DEATH PENALTY AS AN UNCONSTITUTIONAL DEPRIVATION OF LIFE AND THE RIGHT TO PRIVACY†

N. B. SMITH\*

The eighth amendment prohibits cruel and unusual punishment.<sup>1</sup> The United States Supreme Court has repeatedly upheld the use of capital punishment as not violative of this amendment,<sup>2</sup> and has never considered whether the use of the death penalty abrogates an individual's right to life or privacy. Although a few state courts have considered whether use of the death penalty unconstitutionally deprives an individual of his right to life and abrogates his right to privacy, with the exception of the Massachusetts Supreme Judicial Court,<sup>3</sup> they have done so without careful analysis.<sup>4</sup>

In *Commonwealth v. O'Neal*, the Massachusetts Court invalidated a capital punishment statute as violative of the constitutional rights to privacy and life after first finding that the statute did not violate the eighth amendment.<sup>5</sup> The *O'Neal* decision suggests that the use of the death penalty requires scrutiny in addition to the traditional eighth amendment analysis because death penalty statutes impact upon the constitutional rights to life and privacy.

This article evaluates the use of the death penalty and considers whether its use unconstitutionally deprives individuals of their rights to life and privacy. The first section of the article will review the current Supreme Court jurisprudence on the constitutional rights, other than the eighth amendment protections against cruel and unusual punishment, implicated in an analysis of the validity of the death penalty. In this section, the right to life, particularly in the context of the emergent right to end life and the manifest right to preserve life will be discussed. This section will also explain why these rights are relevant to an evaluation of the use of the death penalty. Next, the article will review the Supreme Court's recent analysis of capital punishment under the eighth amendment. Finally, the article will discuss the standards under the constitutionally based rights to life and privacy by which the death penalty should also be measured. The three claimed justifications for the death penalty — deterrence, incapacitation and retribution — will be separately considered according to the tests specified for the constitutional rights to life and privacy. It will be submitted that the use of the death penalty does not pass constitutional muster when examined under the standards employed by the Court in evaluating governmental action in light of the rights to privacy and life.

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\* L.L.B. Harvard Law School 1965; B.A. University of North Carolina, Chapel Hill 1960; Partner in Smith, Patterson, Follin, Curtis, James and Harkavy, Greensboro, North Carolina.

<sup>1</sup> U.S. CONST. amend. VIII.

<sup>2</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *In re Klemmer*, 136 U.S. 436 (1890).

<sup>3</sup> *Commonwealth v. O'Neal*, 369 Mass. 242, 339 N.E.2d 676 (1975).

<sup>4</sup> See, e.g., *Glidewell v. State*, 663 P.2d 738, 743 (Okla. Crim. App. 1983); *State v. Jerrett*, 309 N.C. 239, 267; 307 S.E.2d 339, 354 (1983); *State v. Hodges*, 89 N.M. 351, 353-60, 552 P.2d 787, 789-796 (1976).

<sup>5</sup> 369 Mass. 242, 243, 339 N.E.2d 676, 677 (1975).

# I. EXPLICATION OF THE CONSTITUTIONAL RIGHTS RELEVANT TO AN ANALYSIS OF THE DEATH PENALTY

## A. *The Constitutional Right to Privacy*

The Constitution nowhere expressly recognizes a right to privacy. Antecedents of such a right, however, can be found in *Union Pacific Ry. Co. v. Botsford*,<sup>6</sup> a century-old United States Supreme Court case, and in the relatively recent cases of *Griswold v. Connecticut*<sup>7</sup> and *Roe v. Wade*,<sup>8</sup> where the Court held that the right of privacy is a fundamental constitutional right which binds both the federal and state governments. Yet, as the Court confirmed in *Paul v. Davis*,<sup>9</sup> the constitutional right to privacy is not without limits. In *Davis*, the Court refused to recognize a constitutional right to privacy under the common law tort of invasion of privacy as applied to defamation.<sup>10</sup> Although the dimensions of the right to privacy are not fully developed, the essence of the right was succinctly stated by Justice Brandeis in his dissent in *Olmstead v. United States* as the right "to be left alone."<sup>11</sup>

Three principal branches of the constitutional right to privacy may be traced in the case law. One aspect of the right of privacy, rooted in its first, third, fourth, and fifth amendment antecedents,<sup>12</sup> protects a person's private thoughts, speech, writings, readings and other received communications from unintended disclosure.<sup>13</sup> The second protected zone of privacy, derived primarily from the ninth amendment,<sup>14</sup> embraces the home and family, the marital relationship, procreation, and the rearing and education of children.<sup>15</sup> A third branch of the constitutional right of privacy and the one on which this discussion focuses relates to an individual's physical integrity and corporeal autonomy. This kind of privacy has been summarized as "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."<sup>16</sup> Some language in the Court's privacy decisions refers to privacy in more narrow, institutional terms by

<sup>6</sup> 141 U.S. 250 (1891).

<sup>7</sup> 381 U.S. 479 (1965).

<sup>8</sup> 410 U.S. 113 (1973).

<sup>9</sup> 424 U.S. 693 (1976).

<sup>10</sup> *Id.* at 712-13.

<sup>11</sup> 277 U.S. 438, 478 (1928). Brandeis and Warren had used the same words in their seminal article, *The Right of Privacy*, 4 HARV. L. REV. 193, 205 (1890). As stated in *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972), privacy is the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person. . . ." *Id.* at 453.

<sup>12</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Roe v. Wade*, 410 U.S. 113, 152 (1973); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 971-72 (1977).

<sup>13</sup> See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (viewing pornographic movies in the privacy of one's home); *Katz v. United States*, 389 U.S. 347, 351-52 (1968) (engaging in a telephone conversation in a phone booth).

<sup>14</sup> See cases cited *supra* note 12.

<sup>15</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (educating one's children); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (married couple's right to use contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (pregnant woman's qualified right to an abortion).

<sup>16</sup> 410 U.S. at 213-14 (Douglas, J., concurring) (emphasis in the original). See generally, Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Craven, *Personhood: The Right to be Left Alone*, 1976 DUKE L.J. 699 (1976); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

emphasizing the home, family, marriage, and child care.<sup>17</sup> Yet, the early seminal case that elucidates the concept of familial privacy,<sup>18</sup> and the later decisions extending abortion rights without regard to spousal and parental interests,<sup>19</sup> and contraceptive rights without parental consent,<sup>20</sup> make clear that the right of privacy includes individual, personal autonomy.

These three main branches of the right of privacy have evolved from certain express constitutional liberties. That aspect of privacy which concerns physical integrity apparently derives from personal substantive due process.<sup>21</sup> Both the fifth and fourteenth amendments erect protections of "life" and "liberty" against governmental interference.<sup>22</sup> To restrain a person's movements,<sup>23</sup> to strike or even touch a person,<sup>24</sup> to require a person to ingest or expel a substance,<sup>25</sup> to penetrate a person's body with instruments,<sup>26</sup> and certainly to put a person to death is liberty or life-depriving. As the Supreme Court stated in *Union Pacific Ry. Co. v. Botsford*,<sup>27</sup> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own body. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."<sup>28</sup>

### B. The Constitutional Right to Life

Substantive due process has greatly declined in importance as a standard for evaluating the regulation of both economics and human rights.<sup>29</sup> Despite this decline, even in the economic context, the government is not unrestrained and must not act arbitrarily.<sup>30</sup> The same is true in the sphere of human rights regulation. Life and liberty are personal rights which are embraced by the concept of substantive due process, and formerly claimed careful judicial scrutiny when affected by governmental action. *Jacobson v. Massachusetts* illustrates this careful judicial scrutiny.<sup>31</sup> The *Jacobson* Court passed on the state's right to

<sup>17</sup> See, e.g., *Paul v. Davis*, 424 U.S. 693, 713 (1976) (right of privacy not extended to right to keep public records referring to oneself private); *Paris Adult Theatre I v. Slayton*, 413 U.S. 49, 65 (1975) (distinguished between privacy in home and privacy "to watch obscene movies in places of public accommodation").

<sup>18</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt [liberty] denotes not merely freedom from restraint . . . but also to . . . establish a home and bring up children. . .").

<sup>19</sup> *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 72, 75 (1976).

<sup>20</sup> *Carey v. Population Services Int'l*, 431 U.S. 678, 693-94 (1977).

<sup>21</sup> "This right of privacy, whether it be founded in the Fourteenth amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court has determined, in the Ninth Amendment reservation of rights to the people, . . ." *Roe v. Wade*, 410 U.S. 113, 153 (1973) (emphasis added).

<sup>22</sup> *Francis v. Resweber*, 329 U.S. 459 (1947); *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

<sup>23</sup> *Davis v. Mississippi*, 394 U.S. 721 (1969).

<sup>24</sup> *Monroe v. Pape*, 365 U.S. 167 (1967).

<sup>25</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>26</sup> *Schmerber v. California*, 384 U.S. 757, 769-70, 772 (1966) (Human dignity and privacy are "fundamental human interests." "The integrity of an individual's person is a cherished value in our society.").

<sup>27</sup> 141 U.S. 250 (1891).

<sup>28</sup> *Botsford*, 141 U.S. at 250-51.

<sup>29</sup> See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

<sup>30</sup> See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973).

<sup>31</sup> 197 U.S. 11 (1905).

require submission to smallpox inoculation, and observed that there is "a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."<sup>32</sup>

Although substantive due process as a standard to measure human rights has been eclipsed, the constitutional imperative to protect life and liberty has re-emerged in other forms. The extension to the states of the specific guarantees of the Bill of Rights is one example of this re-emergence. The re-emergence that is the focus of this article is the formulation of a constitutional right to privacy.<sup>33</sup>

### C. *The Emergent Right to End Life*

No elaborate proof or sophisticated analysis is required to conclude that the ultimate deprivation of privacy is the involuntary taking of life. One might have expected that the initial and most obvious application of this conclusion would be the preservation of life.<sup>34</sup> The individual's claimed right to terminate his own life, however, has primarily occupied the attention of courts and commentators.

Weighty considerations militate against permitting an individual to end his own life. Foremost among these considerations is the state's interest in preserving life.<sup>35</sup> In addition, the concepts of the inviolability and protection of life, are bolstered by the constitutional principles of the right to life and privacy.<sup>36</sup> The state also has an interest in protecting persons from hasty and ill-considered decisions they make when desperate or in pain.<sup>37</sup> One commentator has suggested that permitting patients to die will inevitably lead to forcing death upon unwilling ones.<sup>38</sup> Finally, there are laws against attempting and assisting the commission of suicide,<sup>39</sup> which are necessarily overturned if self-destruction

<sup>32</sup> *Id.* at 29.

<sup>33</sup> Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1428 (1974).

<sup>34</sup> Reiman, *Privacy, Intimacy and Personhood*, 6 PHIL. & PUB. AFF. 26, 29 (1976) "The right to privacy, then, protects the individual's interest in becoming, being, and remaining a person." Perhaps it is because the constitutionality of the state's death sentence has been considered in terms of eighth amendment cruel and unusual punishment, that the right of privacy analysis has been given little attention by the courts and commentators.

<sup>35</sup> This interest in preserving life is the justification for the anti-snake handling statutes, which are uniformly upheld, *Lawson v. Commonwealth*, 291 Ky. 437, 441-42, 164 S.W.2d 972, 973 (1942), and *Hardin v. State*, 188 Tenn. 17, 23-24, 216 S.W.2d 708, 710 (1948). The same justification is offered for statutes prohibiting helmetless motorcycling, which have met with mixed results in the courts. Annot., 32 A.L.R.3d 1270 (1970).

<sup>36</sup> See *In re Quinlan*, 70 N.J. 10, 19 n.1, 355 A.2d 647, 652 n.1 (1976) (acknowledges that the state's interest in preservation of life is constitutionally based).

<sup>37</sup> See Note, *The Refusal of Lifesaving Medical Treatment vs. The States Interest in the Preservation of Life: A Clarification of the Interests at Stake*, 58 WASH. U.L.Q. 85, 109-10 (1980); *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978) (where a patient was allowed to refuse a lifesaving amputation, while in abnormal mental condition, although possessing minimal legal competence).

<sup>38</sup> See Kamisar, *Some Non-Religious Views Against Proposed "Mercy Killing" Legislation*, 42 MINN. L. R. 969 (1958). Indeed, the landmark case in this area, *In re Quinlan*, authorized a guardian to make the decision to discontinue life support for a comatose patient, whose own willingness or nonwillingness to die could never be known. 70 N.J. at 52, 355 A.2d at 670.

<sup>39</sup> W. LAFAYE AND A. SCOTT, JR., CRIMINAL LAW 569 (1972). But see *In re Quinlan*, 70 N.J. 10, 52, 355 A.2d 647, 670 (1976) (attempted suicide offense invalidated by constitutional right of privacy). Ingenious arguments are advanced to immunize medical personnel from liability for aiding suicide, including a distinction between "active" and "passive" euthanasia (the latter inexplicably including

is authorized. Notwithstanding these objections, since the decision in the *Quinlan*<sup>40</sup> case, courts have almost unanimously held that individuals have both the right to refuse medical treatment and to die.<sup>41</sup> These cases uphold the right to die, not only for incurably and terminally ill patients, but also for those who refuse necessary medical care that might allow years of pain-free life.<sup>42</sup> Courts have invariably invoked the right of "bodily integrity," one aspect of the constitutional right of privacy, as both justifying and mandating this result.<sup>43</sup>

Courts have also considered the right to die as a component of the constitutional right to privacy in cases involving prison inmates. Traditionally, states jealously guard their prerogative to impose capital punishment, and death is allowed only in the prescribed time and manner after all the necessary preparations have been made.<sup>44</sup> This insistence on formality is made particularly clear when a prisoner on death row becomes mentally incompetent; he is not executed until his mental capacity is restored, for otherwise he would not fully appreciate the gravity of both crime and punishment.<sup>45</sup>

Courts have reacted in mixed fashion to the situation in which a prisoner decides that he is going to commit suicide.<sup>46</sup> The Georgia Supreme Court has held that a prisoner's right to privacy includes the ability to starve himself to death.<sup>47</sup> Appellate courts in West Virginia and New York, however, have held that the starving prisoner's right to privacy does not outweigh the state's prerogative to preserve his life by force feeding, in order that he might serve his full sentence.<sup>48</sup> Criticizing the position of the Georgia Supreme

the discontinuation of a life support machine), which would not pass muster under common law homicide principles. See Brown and Truit, *Euthanasia and the Right to Die*, 3 OHIO N.U.L. REV. 615 (1976).

<sup>40</sup> *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

<sup>41</sup> See cases cited *infra* note 43.

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Lane v. Candura*, 6 Mass. App. 377, 377-78, 376 N.E.2d 1223, 1232 (1978) (competent woman had right to refuse life-saving amputation); *Sats v. Perlmutter*, 362 So.2d 160, 164 (Fla. Dist. App. 1978); *In re Quackenbush*, 156 N.J. Super. 282, 290, 283 A.2d 785, 787 (1978) (man had right to refuse amputation when it would not have enhanced quality of life); *Supt. of Belchertown v. Sakewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977) (right to refuse chemotherapy which might prolong life); *In re Yeatter*, 62 Pa. D. & C.2d 619, 623 (1973) (right to refuse surgery which may prolong life); *Erickson v. Dilgard*, 252 N.Y.S.2d 705, 706 (1962) (adult had right to refuse transfusion even if it resulted in death). Among the many commentaries, mostly favorable to these decisions are Richards, *Constitutional Privacy, the Right to Die and the Meaning Of Life*, 22 WM. & MARY L. REV. 327 (1981); Note, *The Right of Privacy and the Terminally-Ill Patient: Establishing the Right to Die*, 31 MERCER L. REV. 603 (1980); Note, *The Refusal of Life-Saving Medical Treatment vs. the State's Interest in the Preservation of Life: A Clarification of the Interests at Stake*, 58 WASH. U.L.Q. 85 (1980); Horan, *The "Right to Die": Legislative and Judicial Developments*, 13 FORUM 488 (1978); Note, *The Legal Aspects of the Right to Die: Before and After the Quinlan Decision*, 65 KY. L.J. 823 (1977); Delgado, *Euthanasia Reconsidered — The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1975).

<sup>44</sup> 24 C.J.S. *Criminal Law* § 1613 (1961).

<sup>45</sup> See cases collected in Annot., 49 A.L.R. 804 (1977).

<sup>46</sup> Apart from violent suicide which prison guards are watchful to prevent, the two most common ways for a prisoner to commit suicide are to stop eating and to give up appealing his conviction and sentence. In some European countries where, before the recent abolition of the death penalty, executions were very rare, and where the guards must be less vigilant than they are in the United States, about 20% of all murderers committed suicide. M. WOLFGANG AND F. FERRACUTI, *THE SUBCULTURE OF VIOLENCE* (1967).

<sup>47</sup> *Zant v. Prevatte*, 248 Ga. 832, 834, 286 S.E.2d 715, 716-17 (1982). The prisoner had formerly been under a death sentence.

<sup>48</sup> *State ex rel. White v. Narick*, 292 S.E.2d 54, 58-59 (W.Va. 1982); *Von Holden v. Chapman*, 87 A.2d 66, 69-70, 450 N.Y.S.2d 623 (1982). See Note, *Constitutional Law — Forced Feeding of a Prisoner on a Hunger Strike: A Violation of an Inmate's Right of Privacy*, 61 N.C.L. REV. 714 (1983).

Court, the West Virginia court observed that for a state to permit an inmate to kill himself based on his ability under the right of privacy to refuse medical treatment for voluntary debilitation, made little sense if the state simultaneously reserved to itself the right to execute the prisoner.<sup>49</sup> The West Virginia court labelled this state action the "ultimate violation of [the prisoner's] privacy rights."<sup>50</sup> This court further stated that "we doubt that Georgia would allow [an inmate] to raise his right of privacy against being put to death, as a defense against the death penalty."<sup>51</sup>

Another way for an inmate to facilitate his own death involves abandoning post-appellate discretionary appeals. Most states with death penalties have statutes providing for automatic appeals.<sup>52</sup> This process uniformly has been held to be nonwaivable by the defendant.<sup>53</sup> The Supreme Court has determined, however, that a death row inmate has the right to abandon post-appellate discretionary review of his case even if apparently meritorious grounds exist for such a review.<sup>54</sup> Like any other prisoner, a prisoner on death row should possess all constitutional rights which are not inconsistent with the institutional requirements of lawful incarceration.<sup>55</sup> Exercising the right of privacy to choose death by starvation or to accelerate death by forfeiting appeals does not demonstrably interfere with the institutional concerns of security and good order.<sup>56</sup> If the right of privacy confers on a free person the right to end his own life, then this right should also belong to the condemned prisoner.<sup>57</sup>

### C. *The Manifest Right to Preserve Life*

The constitutional right to privacy protects the right to end one's own life despite serious countervailing considerations. Likewise, fully as much recognition should be granted to the right to preserve life. The right to life derives from the "irreducible perception that life and the organic base on which it subsists are somehow sacred. It is . . . 'the primordial experience of being alive, of experiencing elemental sensation of vitality and of fearing its extinction' that generates the sense of sanctity that attaches to the living

<sup>49</sup> State ex rel. White v. Narick, 292 S.E.2d 54, 57 (W.Va. 1982).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> E.g., N.C. GEN. STAT. § 15A-2000(d)(1) (Michie 1978).

<sup>53</sup> Goode v. State, 365 So.2d 381, 384 (Fla. 1978); People v. Stanworth, 71 Cal.2d 820, 832-33, 457 P.2d 889, 80 Cal. Rptr. 49, 58-59 (1969). See Note, *The Death Row Right to Die: Suicide or Intimate Decision*, 54 So. CAL. L. REV. 575 (1980).

<sup>54</sup> Hammett v. Texas, 448 U.S. 725, 725 (1980); Evans v. Bennett, 440 U.S. 987, *vacating stay of execution*, 440 U.S. 1301 (1979).

<sup>55</sup> See Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974), Procunier v. Martinez, 416 U.S. 396, 413 (1974).

<sup>56</sup> Two courts, however, have held otherwise. Von Holden v. Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982) (strikes by inmates violate the prison's duty to "protect life of prisoners"); Commissioner of Correction v. Myers, 379 Mass. 255, 399 N.E.2d 452 (1979) (state may force prisoner to accept dialysis because of the state's interest in maintaining orderly prisons).

<sup>57</sup> Most death penalty abolitionists support the right to refuse medical treatment, but take a seemingly inconsistent position in opposition to permitting condemned prisoners to choose death. See *supra* note 53. These abolitionists are of the opinion that even one more execution will make it easier for executions to become routine. H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 122-23 (1977). It is interesting to note that the few executions which took place between 1967 and 1979 were of prisoners who gave up their appeals and expressed a desire to die.

human being."<sup>58</sup> The weighty countervailing considerations that those wishing to die must overcome are not applicable when one seeks to preserve life. Preservation of life, as opposed to its destruction, advances rather than defeats the state's interest in preserving life. In addition, when the goal is the preservation of life, there is a greatly diminished risk of hasty and ill-considered decisions because a decision to continue living can be reversed at any time. Finally, preservation of life does not require that the criminal law be abrogated — allowing an individual to live is not a crime.<sup>59</sup> The constitutional right of privacy is a powerful bulwark for the preservation of life.

The right to preserve life as either a component of the right of privacy or as a matter of substantive due process, has received little attention from the courts. The reason apparently lies in certain historical developments of the governmental branches. From the nadir of substantive due process in the 1930's until the pronouncement of the right of privacy in the 1960's the federal courts were without constitutional principles with which to analyze right to life claims.<sup>60</sup> During the same period, however, Congress and the Executive Branch engaged in activity of unprecedented scale to eliminate common threats to life, by providing food, housing, medical care and other basic necessities of those in need.<sup>61</sup> In fact, by the 1960's, the political branches had essentially granted Americans the "freedom from want" first proclaimed by President Roosevelt,<sup>62</sup> and the courts' task was limited largely to interpreting and enforcing the laws on these subjects.<sup>63</sup>

By the time the Supreme Court recovered its capacity to define the right to life, the political branches had pre-empted the field and the need for the courts to intervene had disappeared. If the political branches fail to provide for life-sustaining needs, however, the hope is that the courts will define the right to life as an element of the right to privacy and as a matter of due process to include the right of each person to be provided with life's basic necessities.

In upholding the constitutional interest of preserving life, ordaining that the government shall not kill those who want to live is a much easier matter than requiring that the government take positive steps to preserve life. The government's active role in killing, therefore, becomes the focal point. Some federal courts have directly addressed claims of a right to life. This issue is raised initially when deadly force is used to apprehend those suspected of committing nondangerous felonies. Many jurisdictions have adopted statutes allowing police to use deadly force only where a violent felony has been committed or where the suspect is armed and likely to endanger others.<sup>64</sup> A number of jurisdictions continue to allow police to shoot at fleeing suspects whose crimes are nonviolent and who pose no immediate danger to others.<sup>65</sup> The Fourth, Sixth and Eighth Circuits have condemned the latter position, holding that such police conduct violates a

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<sup>58</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-12, at 938 (1978), citing Shils, *The Sanctity of Life*, ENCOUNTER, Jan. 1967 at 39.

<sup>59</sup> See *supra* notes 35-39 and accompanying text.

<sup>60</sup> See *supra* note 29 and accompanying text.

<sup>61</sup> This governmental activity began with the Social Security Act, 49 Stat. 620 (1935), and the National Housing Act, 48 Stat. 1246 (1934).

<sup>62</sup> BARTLETT'S FAMILIAR QUOTATIONS 920 (13th Ed. 1955) (Message to Congress, Jan. 6 1941).

<sup>63</sup> In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court ignored an opportunity to declare that food and shelter are among the fundamental rights protected by the constitution. See *id.* at 522 (Marshall, J., dissenting); see also Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419 (1974).

<sup>64</sup> E.g., N.C.G.S.15A-401(d) (2)b; Model Penal Code § 3.02(2)(b) (Proposed Official Draft, 1962).

<sup>65</sup> See cases collected Annot., 83 A.L.R. 3d 174, 208-12 (1978).



suspect's fourteenth amendment right to life.<sup>66</sup> In condemning the practice of shooting fleeing felons regardless of the circumstances, the Sixth Circuit refused to follow its own recent cases which held that such police conduct did not amount to cruel and unusual punishment.<sup>67</sup> The court distinguished these prior eighth amendment cases on the ground that the newly-raised life or liberty question is a different issue from that raised under the eighth amendment. Recognition of this distinction is particularly significant to a comparative analysis of the death penalty under the eighth amendment and under the constitutionally-based rights to life and privacy, and is discussed in the next section of this article.

## II. THE SUPREME COURT'S ANALYSIS OF CAPITAL PUNISHMENT UNDER THE EIGHTH AMENDMENT: NOT CRUEL OR UNUSUAL

Before examining the death penalty in light of the constitutional concepts of privacy and right to life, a review of the Supreme Court's recent analysis of capital punishment under the eighth amendment is necessary. Only two Supreme Court Justices — Brennan and Marshall — have espoused the view that the death penalty is *per se* cruel and unusual punishment.<sup>68</sup> In *Furman v. Georgia*,<sup>69</sup> the Court struck down the death penalty under the eighth amendment on the grounds of arbitrariness because of the lack of standards to guide juries in deciding on punishment.<sup>70</sup> Some state legislatures responded to the *Furman* decision by making the death sentence mandatory for certain crimes, but these laws were struck down as arbitrary for failing to consider the unique circumstances of each crime and the individual defender.<sup>71</sup> In *Gregg v. Georgia*, however, the Court considered and upheld against eighth amendment challenges the validity of complicated sentencing schemes by which juries find mitigating and aggravating factors from the facts of each case and decide from these factors whether to sentence an offender to life imprisonment or death.<sup>72</sup>

In his opinion for the Court in *Gregg*, Justice Stewart focused on the eighth amendment inquiry, taking the essence of his analysis from *Trop v. Dulles*.<sup>73</sup> Stating that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"<sup>74</sup> the Court concluded that a form of punish-

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<sup>66</sup> See e.g., *Garner v. Memphis Police Dep't*, 710 F.2d 240, 243 (6th Cir. 1983) (principal holding was an unreasonable seizure in violation of the fourth amendment); *Mattis v. Schnar*, 547 F.2d 1007, 1019-20 (8th Cir. 1976), *vacated as moot sub nom*, *Ashcraft v. Mattis*, 431 U.S. 171, 172 (1977); *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir. 1970) (nominally involving fourth amendment to protect an "individual's physical integrity").

<sup>67</sup> *Garner v. Memphis Police Dep't*, 710 F.2d 240, 247-48 (6th Cir. 1983) (distinguishing *Wiley v. West Memphis Police Dep't*, 548 F.2d 1247 (6th Cir. 1977)).

<sup>68</sup> See *Furman v. Georgia*, 408 U.S. 238, 257, 306 (Brennan, J., concurring), 314 (Marshall, J., concurring) (1972); *Gregg v. Georgia*, 428 U.S. 153, 227-31 (Brennan, J., dissenting), 231-41 (Marshall, J., concurring) (1976).

<sup>69</sup> 408 U.S. 238 (1972).

<sup>70</sup> 408 U.S. at 309-10 (Stewart, J., concurring), 255-57 (Douglas, J., concurring), 291-95 (Brennan, J., concurring).

<sup>71</sup> See e.g., *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (mandatory death sentence does not provide objective standard).

<sup>72</sup> 428 U.S. 153, 199-207 (1976).

<sup>73</sup> 356 U.S. 86 (1958) (quoted at 428 U.S. at 173).

<sup>74</sup> 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

ment is not cruel or unusual if it is not offensive to contemporary community values.<sup>75</sup>

The *Gregg* Court's eighth amendment analysis limits the review of states' justifications for the death penalty in three ways. First, the state interests relied upon to support the penalty need not be demonstrable or provable. Second, a heavy burden is placed upon the party challenging the correctness of the state's claimed basis. Third, the state is under no compulsion to use the least severe penalty.<sup>76</sup>

The *Gregg* Court enumerated deterrence, retribution, and incapacitation as the interests claimed to be served by the death penalty.<sup>77</sup> Regarding deterrence, none of the justices in the majority were convinced that capital punishment deters crime, but each deferred to the states' legislative judgments that the death penalty is a deterrent.<sup>78</sup> The *Gregg* Court stated that "[s]tatistical attempts to evaluate the worth of the death penalty as a deterrent to crime by potential offenders have occasioned a great deal of debate. The results have been inconclusive."<sup>79</sup> Instead of addressing retribution alone as a justification for the death penalty, the Court presented retribution simply as a variant of deterrence. The Court stated that "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law."<sup>80</sup> In the following discussion of the justifications offered to support the death penalty in light of the rights to life and privacy, deterrence will assume the greatest importance of these three justifications.

### III. THE DEATH PENALTY AND THE CONSTITUTIONAL RIGHTS TO LIFE AND PRIVACY

#### A. *Standards Applicable to the Rights to Life and Privacy*

The standards by which the death penalty must be measured under either the constitutional right to life or the constitutional right to privacy are more exacting than

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<sup>75</sup> Justice Stewart stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the eighth amendment. . . . It requires . . . that we look to objective indicia that reflect the public attitude toward a given sanction." 428 U.S. at 173. Justice Stewart also concluded that the eighth amendment requires an inquiry as to whether a particular punishment is barbarous, grossly disproportionate to the offense committed or contrary to human dignity. 428 U.S. at 170-73. Justice Stewart also cited public opinion polls showing shifting majority expressions in favor of the death penalty. *Id.* at 181 and n. 25.

<sup>76</sup> The *Gregg* Court stated:

[W]e may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards.

428 U.S. at 175.

<sup>77</sup> 428 U.S. at 183 & n.28.

<sup>78</sup> *Id.* at 184-85.

<sup>79</sup> *Id.* at 175. A few lines later in the opinion, however, and without citing supporting evidence of authority, Justice Stewart stated that "the death penalty undoubtedly is a significant deterrent. . . ." *Id.* at 185-86. In *Furman*, Chief Justice Burger had found the evidence of deterrence either stalemated or inconclusive. 408 U.S. at 395. In the same decision, Justice Powell observed that studies tended to support the view that the death penalty is not a superior deterrent. 408 U.S. at 454-55.

<sup>80</sup> 428 U.S. at 183 (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972)). Justice Marshall notes this as nothing more than deterrence mislabelled. 428 U.S. at 237-39.

those standards that apply to the constitutional prohibition of cruel and unusual punishment. Because the right to privacy is fundamental, restrictions on it are "justified only by a 'compelling state interest,' . . . and [if] legislative enactments [are] narrowly drawn to express only the legitimate state interests at stake."<sup>81</sup> No cases have held that the fourteenth amendment right to life alone is fundamental when viewed apart from the modern right of privacy. While the Supreme Court has hesitated to denominate previously unlabelled rights as "fundamental" in recent years, life itself is plainly a basic and essential right, and the Court would have difficulty in plausibly declaring life to be less than fundamental. The substantive due process cases decided before rights were labelled "fundamental" or non-fundamental reveal, however, a far greater deference than the deference accorded under the eighth amendment analysis employed in *Gregg*.<sup>82</sup> For example, in *Jacobson v. Massachusetts*,<sup>83</sup> the Supreme Court upheld the states' right to compel individuals to submit to smallpox vaccination.<sup>84</sup> The *Jacobson* Court, in upholding the state's position, observed that the state action in question was "necessary for the public health or the public safety."<sup>85</sup>

Assuming that the right to life is fundamental, the three claimed justifications for the death penalty — deterrence, incapacitation and retribution — will be separately scrutinized using the tests specified for the constitutional rights to life and privacy. The inquiry under these tests is two part. First, the test requires a determination whether a compelling state interest or a necessity on grounds of public health and safety exists to exact the death penalty. Second, the test requires a determination whether a lesser penalty would adequately serve the states' claimed interest. Unlike an eighth amendment analysis, under an analysis grounded on the constitutional rights to life and privacy, the burden of proof is on the state and not the accused. Under the latter analysis, if an evaluation of the evidence in a particular case leads only to a speculative conclusion, the state's claimed justification must be rejected.<sup>86</sup>

### B. Deterrence

Deterrence is by far the most important claimed justification for the death penalty.<sup>87</sup> The intuitive belief that capital punishment would be abolished if it became widely

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<sup>81</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973). *Accord*, *Katz v. United States*, 389 U.S. 347, 355 (1968) (no greater invasion of privacy than is necessary under the circumstances).

<sup>82</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

<sup>83</sup> 197 U.S. 11, 27 (1905). Even so, the *Jacobson* Court made it clear that the law had not been interpreted "[to establish] the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death." 197 U.S. at 39. The significance this reservation has for capital punishment cases is readily apparent.

<sup>84</sup> *Id.* at 27.

<sup>85</sup> *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>86</sup> The following analysis by Van der Haag would be satisfactory for eighth amendment purposes, but is wrong in terms of the constitutional rights to privacy and life:

[T]he statistics . . . show only that there is no statistical proof for the deterrent effect of the death penalty. But they do not show that there is no deterrent effect. Not to demonstrate presence of the effect is not the same as to demonstrate its absence; certainly not when there are plausible explanations for the nondemonstrability of the effect. It is on our uncertainty that the case for deterrence must rest." Van der Haag, *On Deterrence and the Death Penalty*, in *ETHICS AND PUBLIC POLICY* 73, 103-04 (T. Beauchamp ed. 1975).

<sup>87</sup> See *infra* note 89.

realized that the death penalty does not deter punishment is commonly held.<sup>88</sup> Opinion polls consistently disclose that a very high percentage of death penalty supporters believe it is a deterrent, and a very low percentage of capital punishment opponents regard it as a deterrent.<sup>89</sup> Justice Stewart's discussion of retribution in *Gregg v. Georgia* was simply a thinly disguised argument for deterrence.<sup>90</sup> Although he acknowledged that evidence on deterrence is inconclusive, he concluded without explanation that "the death penalty undoubtedly is a significant deterrent. . . ."<sup>91</sup>

A considerable body of statistical evidence on the relationship between executions and homicide is available. This evidence will be examined to determine whether a compelling state interest or necessity on the grounds of public health or safety exists to justify the death penalty. Sellin has done a cross sectional study of comparative homicide rates in states that had abolished capital punishment and neighboring states which were similar in population composition and economic and social conditions that had retained it. He found no statistically significant difference in the murder rate.<sup>92</sup> Support for Sellin's results is found in "longitudinal" studies of murder rates in jurisdictions before and after abolition of the death penalty.<sup>93</sup> Sellin's work, however, is justifiably criticized for the quality of the data used, especially since risk of execution was essentially nil in the retentionist states used for comparison.<sup>94</sup>

In contrast to Sellin's approach, Ehrlich's first work was a time study of the nation as a whole, which examined the relationship between homicide rates and execution risk<sup>95</sup> for the years 1933 to 1969. By applying a multiple regression analysis to control selected variables, he found a negative relationship between the homicide rate and the existence of the death penalty, that is, he found fewer homicides when there were more executions. Ehrlich suggested that one additional execution "may" have resulted in the average of seven or eight fewer murders.<sup>96</sup> This work, however, has been sharply criticized on five

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<sup>88</sup> *Id.*

<sup>89</sup> Two polls reveal 76% and 93% of death penalty supporters believe capital punishment deters, and 29% and 8% of death penalty opponents believe it is a deterrent. Vidman and Ellsworth, *Public Opinion on the Death Penalty*, 26 STANFORD L. REV. 1245 (1974). See also Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VANDERBILT L. REV. 1005 (1977).

<sup>90</sup> See *supra* note 80 and accompanying text. But see *Spaziano v. Florida*, 52 U.S.L.W. 5030, 5034 (1984) ("[T]he primary justification for the death penalty is retribution.").

<sup>91</sup> See *Furman*, 408 U.S. at 185-86.

<sup>92</sup> T. SELLIN, *THE DEATH PENALTY* 21-34 (1959); Sellin, *Homicides in Retentionist and Abolitionist States*, in CAPITAL PUNISHMENT 135 (T. Sellin ed. 1967); Sellin, *Capital Punishment*, 25 FED. PROBATION 3 (1961). A cross sectional study is an analysis of observations on variables at a point in time, as distinguished from a time study which deals with observations covering several time periods. INT. ENCYCL. STATISTICS 91.

<sup>93</sup> Baldus and Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 359, 364-65 (1965).

<sup>94</sup> Either no or very few executions were carried out in the comparison states. Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209, 222-23 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359, 364-65 (1975).

<sup>95</sup> The "execution risk" is the fraction of persons convicted of murder who are subsequently executed.

<sup>96</sup> Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 YALE L.J. 397, 414 (1975). A single regression analysis tests the linear relationship of a single random variable to other fixed or non-random variables, whereas a multiple regression analysis employs either more than one random variable or tests a polynomial rather than a linear relationship. INT. ENCYCL. STATISTICS 523, 529.

grounds. First, the use of nationwide statistics obscured relationships of murder and execution rates between abolitionist and retentionist jurisdictions.<sup>97</sup> Second, the variables for the regression analysis were arbitrarily chosen and while some of the assumptions about their relevancy are testable, none have actually been tested.<sup>98</sup> Third, the correlation between homicide rate and execution risk becomes slightly positive<sup>99</sup> when the last five years, are removed, indicating that structural changes may have taken place between the earlier and later years that would render the statistical model inappropriate.<sup>100</sup> Fourth, logarithmic rather than natural forms of variables are used, resulting in emphasis on variations at lower ranges of variables.<sup>101</sup> Fifth, qualitatively better data for homicide rates are available beginning in 1940.<sup>102</sup>

Yunker used techniques similar to those of Ehrlich to study experience from the years 1960 to 1972.<sup>103</sup> He concluded that a single execution could deter 156 murders.<sup>104</sup> Yunker's work, however, is also seriously flawed. By selecting a period when executions declined and murders rose, he tailored his data to the result desired.<sup>105</sup> He admitted his analysis might contain many technical biases, but did not attempt to correct them or to test alternative specifications. Moreover, he did not use a variety of tests with alternate equations and different variables, as Ehrlich did; instead, he used a single variable. Further, he used a three year lag between homicides and executions, whereas nonlagged rates reveal no statistically significant relationship.<sup>106</sup>

<sup>97</sup> Baldus and Cole, *supra* note 93, at 179.

<sup>98</sup> See Forst, *The Deterrent Effect of Capital Punishment: a Cross-state Analysis of the 1960's*, 61 MINN. L. REV. 743, 746 (1977) [hereinafter cited as Forst]; Baldus and Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170, 183-84 (1975). See also J. JOHNSON, *ECONOMETRIC METHODS* 169, 244 (2d ed. 1972). Without these variables there would have been a positive simple correlation between homicide rate and execution risk, that is, more homicides when there were more executions. See generally, Ehrlich, *supra* note 96, at 409 (supplying and explaining proper formulae).

<sup>99</sup> A positive correlation between homicide rate and execution risk is consistent with counter-deterrence.

<sup>100</sup> Klein, Forst and Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of Estimates*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS OF CRIME 26-28 (A. Blumstein ed. 1977); *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977); Peck, *supra* note 94, at 361. See generally, Bowers and Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research of Capital Punishment*, 85 YALE L.J. 187, 197-99, 201-04 (1975) (These last five years were very atypical in that no executions took place, and the homicide rate rose substantially).

<sup>101</sup> Using logarithmic forms of variables, the difference between two executions per 1,000 convictions is greater than a difference between 350 and 650 executions per 1,000 convictions. This technique has the effect of accentuating the decline in executions in the late 1960's. Bowers and Pierce, *supra* note 100, at 749-50; Wolfgang and Ferracuti, *supra* note 46.

<sup>102</sup> During the 1930's, the Federal Bureau of Investigation figures did not coincide with those of the Bureau of Census, although they later did. If one ends the study in 1963 and begins it in 1940 (or even 1938 or 1939) there is a positive, rather than a negative, coefficient for execution risk in each case. Bowers and Pierce, *supra* note 100, 85 YALE L.J. at 203-05. Criticisms of Ehrlich's work are summarized in Justice Marshall's dissenting opinion in *Gregg v. Georgia*, 428 U.S. 153, 235-36 (1976) (Marshall, J., dissenting).

<sup>103</sup> Yunker, *Is the Death Penalty a Deterrent for Homicide? Some Time Series Evidence*, 5 J. BEHAVIORAL ECON. 45-81 (1976).

<sup>104</sup> *Id.* at 65.

<sup>105</sup> McGahey, *Dr. Ehrlich's Magic Bullet: Economic Theory, Econometrics and the Death Penalty*, 26 CRIME AND DELINQUENCY 485, 493 (1980) [hereinafter cited as McGahey]; Bailey, *An Analysis of the Deterrent Effect of the Death Penalty in North Carolina*, 10 N.C. CENTRAL L.J. 29, 33-34 (1977).

<sup>106</sup> Nonlagged rates were simply the rates of homicides and executions occurring in the same year.

Ehrlich, responding to criticism of his earlier work, did a combined cross sectional analysis and time study of a number of states.<sup>107</sup> He chose the period 1940 to 1950 on the ground that the level of enforcement of capital punishment in executing states was sufficiently high and variable during that decade.<sup>108</sup> He found a negative correlation between homicide and execution rate, consistent with the deterrence hypothesis.<sup>109</sup> While most of the flaws identified in Ehrlich's first study were eliminated in the second work, a serious problem has been identified in the latter. The problem concerned the use of a "dummy" variable, which distinguished executing from nonexecuting states.<sup>110</sup> Only when this dummy variable is included in the same equation with the execution risk does the deterrent effect appear.<sup>111</sup>

Bailey has done two types of studies. The first was a series of investigations of single states — North Carolina, Ohio, Oregon, and California — over periods beginning 1910 to 1918 and ending in 1962.<sup>112</sup> Using a multiple regression analysis like Ehrlich's, he found relationships in most instances that were not statistically significant, and in a few instances positive or counter-deterrent relationships. When Bailey applied his analysis to the nation as a whole, however, his results were different.<sup>113</sup> His multivariate cross-sectional analysis of nationwide execution rates and homicide rates for 28 years within the period 1910 to 1962, with selected socio-demographic factors held constant — percent urban, nonwhite, and unemployment; median family income; education — revealed a negative effect consistent with deterrence in 71% of the years, and a positive effect consistent with counter-deterrence in 25% of the years.<sup>114</sup> Bailey's inconsistent findings are explained by Wasserman, who discovered that the correlation supporting deterrence holds in only 12 states of the Deep South and Northern industrial region which had carried out a large number of executions during the study period.<sup>115</sup> In view of the relatively high correlation of certain socio-economic criteria with the murder rate, Wasserman is of the opinion that

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<sup>107</sup> Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POLITICAL ECONOMY 741, 748-49 (1977) [hereinafter cited as Ehrlich].

<sup>108</sup> *Id.* at 742. The variables used were urban crime rate, homicide rate, probability of conviction generally and for murder in particular, median time spent in prison by all offenders prior to first release, ratio of executions to convictions, median family income, percent of families below one-half median family income, percentage of nonwhites, percentage in age groups 15-24 and 29-34, and percentage of urban population. *Id.* at 750.

<sup>109</sup> Ehrlich, *supra* note 107, at 751, 778.

<sup>110</sup> McGahey, *supra* note 105 at 497.

<sup>111</sup> *Id.* The dummy variable is a constant used as a device for computation of the discriminant function (combination of measures used to make assignments to groups). INT. ENCYCL. STATISTICS 628, 632.

<sup>112</sup> See Bailey, *supra* note 105; Bailey, *An Analysis of the Deterrent Effect of the Death Penalty in Oregon*, 16 WILLAMETTE L. REV. 67 (1979); Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time-Series Analysis*, 28 CLEVELAND ST. L. REV. 51 (1979); Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. CAL. L. REV. 743 (1979). In response to questions raised about his statistical techniques, he reanalyzed the data using the least-square regression procedure, and came up with the same results. Bailey, *Some Further Evidence on Imprisonment vs. the Death Penalty as a Deterrent to Murder*, 2 LAW & HUMAN BEHAVIOR 245 (1978) [hereinafter cited as Bailey].

<sup>113</sup> Bailey, *A Multivariate Cross-Sectional Analysis of the Deterrent Effect of the Death Penalty*, 64 SOCIOLOGY AND SOCIAL RESEARCH 183 (1980). Multivariate analysis is the summarization, representation and interpretation of data when more than one characteristic of each sample unit is measured. INT. ENCYCL. STATISTICS 604. See *supra* note 92 for definition of cross sectional study.

<sup>114</sup> *Id.* at 201-02.

<sup>115</sup> Wasserman, *Non-Deterrent Effects of Executions on Homicide Rates*, 48 PSYCH. REPORTS 137 (1981).

economic and demographic shifts, rather than execution risk, are responsible for the homicide rate.<sup>116</sup>

In contrast to the studies that appear to provide support for the deterrence theory, the results in recent studies by Forst,<sup>117</sup> Knorr,<sup>118</sup> Bechdolt,<sup>119</sup> Boyles & McPheters,<sup>120</sup> Lempert,<sup>121</sup> Passell,<sup>122</sup> and Black & Orsagh<sup>123</sup> are inconsistent with the deterrence theory. For example, Forst did both time series and cross sectional analysis for the period 1960 to 1970.<sup>124</sup> He employed a regression analysis with a model including several variables,<sup>125</sup> and used various accepted statistical tests for the purposes of finding inconsistencies and anomalies, including the variant of a one-year time lag between conviction and execution.<sup>126</sup> Forst found that execution rate was not a statistically significant variable with homicide rate, but that poverty, median family income, race, other crime rate, and conviction rate were related with statistical significance.<sup>127</sup> He also found that the results were consistent with a generalized study of the entire nation for the same decade.<sup>128</sup>

Knorr also employed a statistically eclectic approach, analyzing data from the period 1950 to 1960.<sup>129</sup> He combined time series and cross sectional analyses into a pooled cross sectional time series analysis, with socio-economic variables held constant.<sup>130</sup> Knorr separately studied the nation as a whole, various geographic regions, and the individual states.<sup>131</sup> He chose the 1950's as the study period because a sufficiently wide variety of demographic data did not exist for earlier years, and there were not enough executions after 1960 to extend the study beyond that date.<sup>132</sup> The results were uniformly inconsistent with the deterrence theory.<sup>133</sup>

Bechdolt's time series and cross sectional analyses found no significant relationship

<sup>116</sup> *Id.*

<sup>117</sup> Forst, *supra* note 98.

<sup>118</sup> Knorr, *Deterrence and the Death Penalty: A Temporal Cross-Sectional Approach*, 70 J. CRIM. LAW & CRIMINOLOGY 235 (1979) [hereinafter cited as Knorr].

<sup>119</sup> Bechdolt, *Capital Punishment and Homicide and Rape Rates in the United States: Time Series and Cross Sectional Regression Analyses*, 6 J. BEHAV. ECON. 33 (1977) [hereinafter cited as Bechdolt].

<sup>120</sup> Boyles and McPheters, *Capital Punishment as a Deterrent to Violent Crime: Cross Sectional Evidence*, 6 J. BEHAV. ECON. 67 (1977) [hereinafter cited as Boyles and McPheters].

<sup>121</sup> Lampert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQUENCY 88 (1983) [hereinafter cited as Lampert].

<sup>122</sup> Passell, *The Deterrent Effects of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61 (1975) [hereinafter cited as Passell].

<sup>123</sup> Black & Orsagh, *New Evidence on the Efficacy of Sanctions as a Deterrent to Homicide*, 58 SOC. SCI. QUARTERLY 616 (1978) [hereinafter cited as Black & Orsagh].

<sup>124</sup> Forst, *supra* note 98, at 751.

<sup>125</sup> These variables were age, race, sex, resident populations, urbanization, school enrollment rate, divorce rate, median family income, rate at which other crimes were committed, proportion of families living in poverty and whether the state is Southern, as well as homicide rate, conviction rate, execution rate, and average prison time. Forst, *supra* note 98, at 751. See *supra* note 96 for definition of "regression analysis."

<sup>126</sup> *Id.* at 755-61.

<sup>127</sup> *Id.* at 754.

<sup>128</sup> Forst, *supra* note 98, at 747-51, 762.

<sup>129</sup> Knorr, *supra* note 118.

<sup>130</sup> *Id.* at 247-51. Pooling time series and cross sectional studies is a means by which their inter-relationships can be analyzed. See INT. ENCYCL. STATISTICS 555. For definitions of these terms see *supra* note 96.

<sup>131</sup> *Id.* at 247-51.

<sup>132</sup> *Id.* at 247-48.

<sup>133</sup> *Id.* at 249-53.

between the homicide rate and executions.<sup>134</sup> Similar studies by Black & Orsagh,<sup>135</sup> Boyles & McPheters,<sup>136</sup> and Passell<sup>137</sup> are also inconsistent with the deterrence hypothesis. Lampert, following Sellin's approach but taking Ehrlich's criticisms into account, compared states on the basis of murderers executed, correlating differences in executions and homicide rates. He also found no reason to conclude that executions deter homicides.<sup>138</sup>

In addition to the results of statistical analyses, common sense dictates that the death penalty as presently administered is not a deterrent. Even today when capital punishment has been restored in a majority of states in forms of which the Supreme Court approves, death sentences are rarely imposed.<sup>139</sup> Still more rarely do these sentences withstand appellate and collateral review.<sup>140</sup> To believe that a person contemplating murder would feel substantially threatened by the statistical likelihood that he or she would receive the death penalty goes against the dictates of common sense.<sup>141</sup> In fact, the Supreme Court itself has given the hypothetical "thoughtful" potential killer the blueprint for a perfect crime, if that person's sole objective is to escape the death penalty. In *Godfrey v. Georgia*,<sup>142</sup> the Court struck down a death sentence after carefully reviewing the circumstances of the crime, holding that the death penalty should be reserved only for the particularly heinous, atrocious murderer. According to the *Godfrey* Court's reasoning, if the murder is committed humanely, painlessly, and without warning, though probably not for hire, the death penalty could not be imposed on the murderer.<sup>143</sup>

As the foregoing discussion indicates, neither a "compelling" showing nor a demonstration of "necessity" that the death penalty deters homicide has been made. To the contrary, a significant possibility exists that the greater frequency of capital punishment is associated with a rise in the homicide rate. A recent study by Bowers and Pierce is illustrative.<sup>144</sup> These researchers analyzed the executions of offenders and the number of homicides in New York State from 1907 to 1963 to determine how the number of homicides per month was affected by the executions of the preceding year.<sup>145</sup> Multiple regression techniques were used with controls for seasonal variations in the homicide rate and exogenous factors.<sup>146</sup> The researchers found that, on the average, there were two additional homicides during the month following an execution.<sup>147</sup>

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<sup>134</sup> Bechdolt, *supra* note 119, at 57-64.

<sup>135</sup> Black and Orsagh, *supra* note 123, at 626-30.

<sup>136</sup> Boyles and McPheters, *supra* note 120, at 83.

<sup>137</sup> Passell, *supra* note 122, at 78-80.

<sup>138</sup> Lampert, *supra* note 121, at 114-115.

<sup>139</sup> Even before *Furman v. Georgia*, 408 U.S. 238 (1972), the death sentence was rarely imposed. Percentages of homicides resulting in executions in the 1910's were 2.3%; 1920's — 1.5%; 1930's — 3.6%; 1940's — 1.7%; 1950's — .8%; 1960's — .4%. W. J. Bowers, *Executions in America* 36 (1974).

<sup>140</sup> W. J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1090-98 (1984).

<sup>141</sup> See Jones and Potter, *Deterrence, Retribution, Denunciation and the Death Penalty*, 49 UMKC L. REV. 158, 160-161 (1980).

<sup>142</sup> 446 U.S. 420 (1980).

<sup>143</sup> *Id.* at 432-33.

<sup>144</sup> Bowers and Pierce, *Deterrence or Brutalization: What is the Effect of Execution?* 26 CRIME & DELINQUENCY 453 (1980).

<sup>145</sup> *Id.* at 469.

<sup>146</sup> *Id.* at 470.

<sup>147</sup> *Id.* at 481.



Other studies have provided results similar to those of Bowers and Pierce. For example, Savitz studied homicides in Philadelphia eight weeks before and after the imposition of four well publicized death sentences.<sup>148</sup> When seasonally adjusted, the study indicates that five more murders occurred than would have been expected, or, 1.25 per death sentence, in the eight weeks following the executions.<sup>149</sup> King found that there were 1.8 more homicides in South Carolina in the month after a press story recounting an execution than in the preceding month.<sup>150</sup> Graves reported that during the years 1946 to 1955, when California carried out executions on Fridays, more murders were committed on Thursdays and Fridays during weeks when there were executions than were committed on other weekdays.<sup>151</sup> Dann noted that 113 murders were reported in the 60 days following five highly publicized executions, as compared with 91 murders in the 60 days preceding the executions.<sup>152</sup> An explanation of this phenomenon may be found in the desire some people have to be executed. Supporting this explanation are case studies of killers who insisted that they committed murder to be executed.<sup>153</sup> This desire is a recognized psychological phenomenon. As Justice Brandeis stated in his dissent in *Olmstead v. United States*, "[o]ur Government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example."<sup>154</sup>

The studies discussed above demonstrate that deterrence does not provide the compelling state interest necessary for the death penalty to be upheld when analyzed under the constitutional right of privacy. In addition, deterrence does not satisfy the less restrictive means test used in cases involving the constitutional right of privacy. That is, less restrictive means such as imprisonment for life or for a lengthy term will satisfy the same need as does the death penalty. Investigations by Forst, Ehrlich, Glaser and Bailey are of significance on this point. In his time series and cross sectional analyses of homicide rates and execution risks during the period 1960 to 1970, Forst found that one of the two most influential factors in the rising homicide rate was the decline in the rate at which homicide offenses resulted in imprisonment.<sup>155</sup> After evaluating various empirical studies, Glaser concluded that a negative association existed between homicide rate and long prison terms.<sup>156</sup> In states where murder rates were lowest, therefore, median sen-

<sup>148</sup> L. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. LAW, CRIMINAL. & POLICE SCI. 339 (1958).

<sup>149</sup> *Id.* at 341.

<sup>150</sup> King, *The Brutalizing Effect: Execution, Publicity and the Incidence of Homicide in South Carolina*, SOCIAL FORCES 683 (1978).

<sup>151</sup> Graves, *A Doctor Looks at Capital Punishment*, 10 MED. ARTS & SCI. 137, reprinted in H. Bedau, *THE DEATH PENALTY IN AMERICA* 322 (1964). The excedence was sufficiently large to have had only a 5% likelihood of resulting from chance.

<sup>152</sup> Dann, *The Deterrent Effect of Capital Punishment*, 29 FRIENDS SOC. SCI. BULL. 1 (1935).

<sup>153</sup> H. MATTICK, *THE UNEXAMINED DEATH* (1966); H. VON WEBER, *SELBSTMORD ALS MORDMOTIV*, MONATSSCHRIFT FÜR KRIMINALBIOLOGIE UND STRAFRECHTSREFORM 161 (1937).

<sup>154</sup> 277 U.S. 438, 487 (1927) (Brandeis, J., dissenting).

<sup>155</sup> The rate declined from 41.3% in 1960 to 34.6% in 1970. Forst, *supra* note 98 at 762. The other factor was increasing affluence — the homicide rate rose more in states that had the greatest increases in wealth. Forst's results on the relationship between incarceration and the murder rate were consistent with those of the studies by Ehrlich, *supra* note 96 at 410-411, and Passell, *supra* note 122, at 69-71.

<sup>156</sup> Glaser, *Capital Punishment — Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. TOLEDO L. REV. 317, 327, and Table 3 (1978). Ehrlich's figures are to the contrary, except that by 1960 states which seldom executed but still had capital punishment on the books, had achieved lengthier average prison terms than the executing states; *supra* note 107, at 773-77.

tences before parole for willful homicide were the longest and vice versa.<sup>157</sup> The rise in the murder rate from 1960 to 1975 is apparently related to the decline in the median years of murder sentences served until release.<sup>158</sup> Both Ehrlich and Bailey found that severity of prison sentences had a deterrent effect on homicide rates, the latter concluding that this factor is a better predictor of homicides than execution risk.<sup>159</sup> The foregoing studies reveal that the certainty of punishment and the relative severity of prison sentences are more effective deterrents than the death penalty.

Other means of reducing the murder rate, more effective than capital punishment, which do not invade an individual's right of privacy may be considered. One alternative to the death penalty would be to expend more police and prosecutorial resources to secure higher arrest and conviction levels. Both arrest and conviction levels have been found to have a deterrent effect on homicide.<sup>160</sup> Another means to deter homicide is to reduce unemployment. Ehrlich concluded that a 1% change in labor force participation would have a much greater tendency to lower the homicide rate than a 10% increase in the use of capital punishment.<sup>161</sup> Bailey and Bechdolt found in their respective studies that there was a far greater correlation between the unemployment rate and the homicide rate than between the latter and the risk of execution.<sup>162</sup>

### C. Incapacitation

The second claimed justification for capital punishment is incapacitation, sometimes referred to as disablement or specific deterrence. Execution eliminates the possibility that a killer will kill again. The rate of recidivism among paroled or imprisoned capital offenders, however, is extremely low.<sup>163</sup> As Justice Marshall observed in his dissent in *Gregg v. Georgia*, life imprisonment, and solitary confinement if necessary, would fully incapacitate.<sup>164</sup> In a system where life imprisonment or very long sentences are assured for murder convictions, the extremely unlikely possibility that a convicted murderer would kill again negates either a "compelling state interest" or a necessity that capital punishment be invoked. Thus, a life sentence is the least drastic remedy effective for reducing the threat to the community which results from short or nonactive sentences in homicide cases.<sup>165</sup>

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<sup>157</sup> Glaser, *supra* note 156, at 327 and Table 3.

<sup>158</sup> *Id.*

<sup>159</sup> Ehrlich, *supra* note 107 at 771; Bailey, *supra* note 113, at 198.

<sup>160</sup> Ehrlich, *The Deterrent Effect of Capital Punishment*, 67 AM. ECON. REV. 452, 455 (1977). Ehrlich found the conviction rate to be a variable affected by the execution rate. He acknowledged that the conviction rate is likely to decline as the execution rate increases on account of jury reluctance to impose capital punishment. If a 1% increase in executions were to result in more than a .175% decrease in convictions, the deterrence he projected in his first study would have been eliminated. Ehrlich, *supra* note 96; 65 AM. ECON. REV. at 405. See also Passell and Taylor, *supra* note 100; Knorr, *supra* note 118 (arrest rate significantly related to homicide rate at state level). The same suggestion was made by the Solicitor General in his amicus brief in *Fowler v. North Carolina*, in which his primary argument was that the death penalty does not violate the eighth amendment. Brief of Solicitor General at 37-38, *Fowler v. North Carolina*, 428 U.S. 904 (1976).

<sup>161</sup> Ehrlich, *supra* note 96, at 409-10.

<sup>162</sup> Bailey, *supra* note 113, at 198; Bechdolt, *supra* note 119, at 57-64.

<sup>163</sup> C. JAYEARDENE, THE PENALTY OF DEATH 10-16 (1977).

<sup>164</sup> 428 U.S. at 153, 237, n. 14. (1976)

<sup>165</sup> See *supra* notes 155-56 and accompanying text.

#### D. Retribution

The rationales of deterrence and incapacitation are not sufficient to justify the death penalty when analyzed under the constitutional right of privacy. The death penalty will not be justifiable, therefore, unless the third claimed rationale — retribution — is constitutionally sufficient.

True retribution has various attributes. It can be viewed as society's proportional preordained response to the breach of one of its rules.<sup>166</sup> Alternatively, retribution can be viewed as the normal expression of hate or anger which outrageous conduct arouses in people.<sup>167</sup>

What distinguishes pure retribution from other penological objectives is that it is wholly a moral response. It lays claim to no utilitarian value whatsoever. The moment that utilitarian considerations are injected, retribution loses its character and becomes but a species of deterrence. As was previously noted, this transmutation was effected by Justice Stewart in *Gregg v. Georgia*.<sup>168</sup> If retribution is the claimed rationale for a particular punishment, but deterrence is meant, the analysis applicable to the deterrence must be used for retribution. As demonstrated above, the death penalty cannot pass muster as a deterrent under the constitutional scrutiny afforded the rights to privacy and life. The ultimate question thus becomes whether the community's sense of proportionality and its expression of outrage — retribution — will alone justify the death penalty. The answer is that they will not. In the context of the right to privacy it is not justified because the concepts of compelling state interest and least restrictive means are by their nature utilitarian, and are not moral absolutes. Nor is it justified in the context of the right to life, because this right yields only to necessities of public safety and health, values which also are purely utilitarian.<sup>169</sup>

#### CONCLUSION

Imposition of capital punishment by the state must be constitutionally weighed, not only against the prohibition of cruel and unusual punishment, but also against the well defined constitutional rights of privacy and life. Essential to privacy as a constitutional value is the concept of inviolability of the person, while the right to life is literally an element of substantive due process under the fourteenth amendment. The Supreme Court has concluded that for purposes of the eighth amendment, the state need not prove that the death penalty serves its legitimate interests or that it has chosen the least severe penalty necessary to save those interests. In sharp contrast, if the death penalty were evaluated in terms of the constitutional right of life and privacy, the burden would be

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<sup>166</sup> J. Feinberg, "Punishment," in *Punishment* 2, 8 (J. Feinberg and H. Gross eds. 1975).

<sup>167</sup> *Id.*

<sup>168</sup> See *supra* note 80 and accompanying text.

<sup>169</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 27-30 (1905) (right of community to protect itself against small-pox) invoked public health and safety needs to overcome a person's interest in resisting compulsory vaccination. At one time it was said that personal rights could be limited in the interest of public "welfare" or morality, as well. *Mugler v. Kansas*, 123 U.S. 623, 662-63 (1887). Recent cases defining the right of privacy make it clear that considerations of public morality alone will not authorize the limitation of personal rights. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 148 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969); See also Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1431-1432 (1974).

upon the government to show first that it has a compelling state interest to kill and second, that no less invasive measure would suffice.

The possible interests the state can claim to support the death penalty are deterrence, incapacitation, and retribution. An examination of the wealth of relevant data reveals that the death penalty has not been proven to deter homicide, and that, to the contrary, it may be a counter-deterrent, that is, a stimulus of murder. Further, the data indicate that the state would use means less invasive of human rights than the death penalty, to deter homicide, these means including lengthy prison sentences of convicted murderers, additional police and prosecutorial resources, and stimulation of the economy to provide more employment. The death penalty is not required by the interest of incapacitation, since this purpose would be fully served by the alternative penalty of lengthy prison sentences. The remaining interest, retribution, when stripped of the trappings of deterrence with which it is commonly associated, is simply a moral response, not possessed of utilitarian value, and therefore not amounting to a necessary or compelling state interest.

While a few courts have passed upon the validity of the death penalty against claims of rights to privacy and life,<sup>170</sup> only the Massachusetts Supreme Judicial Court in *Commonwealth v. O'Neal*<sup>171</sup> fully considered these constitutional challenges and held invalid the capital punishment law in question. The *O'Neal* court found that the statute did not violate the eighth amendment, and then considered independently the rights to privacy and life.<sup>172</sup> The court stated that "the right to life is fundamental," and concluded that the government must demonstrate both a compelling state interest and the absence of means less restrictive of the rights.<sup>173</sup> The *O'Neal* court held that the state had failed to sustain those burdens.<sup>174</sup> It is submitted that *O'Neal* is correctly decided for the reasons set forth in this article. The United States Supreme Court should follow the reasoning in *O'Neal*, and condemn the death penalty as an unwarranted deprivation of privacy and life.

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<sup>170</sup> See supra note 4 and cases cited therein.

<sup>171</sup> 367 Mass. 440, 327 N.E.2d 662, *reargument of add'l issues*, 369 Mass. 242, 339 N.E.2d 676 (1975).

<sup>172</sup> *Id.*

<sup>173</sup> 367 Mass. at 449, 327 N.E.2d at 668.

<sup>174</sup> 367 Mass. at 448, 339 N.E.2d at 667. Subsequently, the Massachusetts legislature re-enacted a capital punishment provision. Acts 1979, c. 488. This law was invalidated as a cruel, unusual and arbitrary punishment in *District Attorney for Suffolk District v. Watson*, 381 Mass. 648, 650, 411 N.E.2d 1274, 1282-83 (1980), with the court relying in part on the discussion of right to life in *O'Neal*. The voters of Massachusetts amended their constitution on November 2, 1982, to state that "no provision of the Constitution . . . shall be construed as prohibiting the punishment of death." Art. 116 of the Amendment, to the Massachusetts Constitution. The legislature promptly enacted another death penalty law, Acts 1982, c.554, codified as M.G.L. c.279, §§ 57-71. As this article went to press, the court found the new law to be unconstitutional in *Commonwealth v. Colon-Cruz*, 393 Mass. 150, — N.E.2d — (1984), on account of the impermissible burden cast on the rights of trial by jury and against self incrimination by the provision that exempted from the death penalty defendants who pled guilty.

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